



Neutral Citation Number: [2008] EWHC 2565

Case No: CO/3449/2008

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29/10/2008

**Before:**

**LORD JUSTICE SCOTT BAKER**

**-and-**

**MR JUSTICE AIKENS**

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**Between:**

**THE QUEEN ON THE APPLICATION OF  
DEBBIE PURDY**

**Claimant**

**- and -**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**Defendant**

**-and-**

**SOCIETY FOR THE PROTECTION OF  
UNBORN CHILDREN**

**Intervener**

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**David Pannick Q.C. and Paul Bowen (instructed by Bindmans) for the Claimant**  
**Dinah Rose Q.C. and Jeremy Johnson (instructed by Treasury Solicitor) for the Defendant**  
**Charles Foster (instructed by Penningtons) for the Intervener**

Hearing dates: 2/3 October 2008  
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**Approved Judgment**

**Lord Justice Scott Baker :**

1. This is the judgment of the court to which each member has contributed. The issue in the case is whether the Director of Public Prosecutions (“DPP”) has acted unlawfully in failing to publish detailed guidance as to the circumstances in which individuals will or will not be prosecuted for assisting another person to commit suicide. This case is not about whether it should continue to be a criminal offence in this country to help another person, whatever the circumstances, to take their own life. That is a matter for Parliament and not the courts. Nor is this case about whether someone can obtain in advance immunity from prosecution for helping another person to travel to another country where assisted suicide is lawful, for the purpose of an assisted suicide; that question has already been decided in the negative by the House of Lords.

*Background*

2. It is not a criminal offence to take one’s own life. That has been the law since the Suicide Act 1961 (“the Act”) – see s.1(1). However, it is an offence to assist another person to commit suicide. S.2(1) of that Act provides:

“A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years.”

The subsection is widely phrased so as to encompass all cases, whatever the circumstances; it creates no exceptions. The Act does, however, provide in s.2(4) that no proceedings shall be instituted except by or with the consent of the DPP.

3. The claimant, Debbie Purdy, who is 45, suffers from primary progressive multiple sclerosis which was diagnosed in 1995. She has been a wheelchair user since 2001. As her condition deteriorates she will become increasingly incapable of carrying out everyday tasks. She accepts that there will come a time when her continuing existence will become increasingly unbearable, at which point she will wish to end her own life. Because it is an offence in the United Kingdom to aid, abet, counsel or procure a person to commit suicide, if she decides to carry out this wish she will have to travel to a country where “assisted suicide” is lawful. This would probably be Switzerland where she would be able to use the services of Dignitas, an organisation founded in 1998 to assist those with “medically diagnosed hopeless or incurable illness, unbearable pain or unendurable disabilities” to end their life with dignity. The practice of assisted suicide is also lawful in Belgium, the Netherlands, Luxemburg and Oregon, USA.
4. Ms Purdy anticipates that, because of her condition, she would be unable to make the necessary arrangements without the assistance of her husband. It is acknowledged by counsel on all sides that if her husband, Omar Puente, did assist Ms Purdy to make arrangements so that she could use the services of Dignitas or a similar organisation, he would consequently be at risk of prosecution and conviction under s.2(1) of the Act. Mr Puente is an interested party in these proceedings. She and he wish to know whether he is likely to be prosecuted under s.2(1) of the Act in the event that he assists her in making arrangements to travel abroad for this purpose.

5. The present proceedings are a claim for judicial review and a claim under s.7 of the Human Rights Act 1998. The claimant challenges what she regards as the failure of the DPP to promulgate a specific policy as to the circumstances in which a prosecution will be brought for aiding and abetting, counselling or procuring a suicide contrary to s.2(1) of the Act, in particular where the assisted suicide takes place in a country where the practice is lawful. Although the present claim is concerned only with the offences of aiding and abetting a suicide, as already noted s.2(1) of the Act also covers counselling and procuring a suicide. In practice all four concepts will frequently overlap in the context of a suicide.
6. The evidence suggests that since October 2002 at least 90 United Kingdom citizens have travelled abroad for the purpose of lawfully obtaining an assisted suicide, but that in no single instance has a prosecution resulted, notwithstanding some investigations by the police. Unsurprisingly, the claimant and her husband wish to know where they would stand in similar circumstances. What is the risk that Omar Puentes would be prosecuted were he to assist Ms Purdy in fulfilling her stated wishes?
7. The issue raised in the present case is very similar to, but distinct from, that decided by the House of Lords in *R (Pretty) v DPP* [2002] 1 AC 800 [2001] UK HL 61. Mrs Pretty too suffered from the degenerative disease of multiple sclerosis and faced the same dilemma as the claimant. She asked the DPP to give her husband immunity from prosecution under s.2(1) of the Act, prior to the possible commission of any offence by him. The House of Lords held that since the executive had no power to dispense with or suspend laws or their execution without Parliamentary consent, the DPP had no power to undertake that a crime yet to be committed should be immune from prosecution. Claims to invoke the assistance of arts 2, 3, 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms (“the ECHR”) all failed.
8. The claimant accepts that in the light of the House of Lords decision in *Pretty* she cannot ask for a proleptic decision that her husband will not be prosecuted. Instead she puts her case rather differently, arguing that there is a duty on the DPP to publish a specific policy outlining the circumstances in which a prosecution under s.2(1) of the Act would or would not be appropriate or setting out the public policy factors that would be taken into account for and against prosecuting in each case.
9. This distinction in the relief sought by the claimant in this case compared with the *Pretty* case has a consequence which at first sight might seem surprising. It is that whereas *Pretty* was a “criminal cause or matter” within the meaning of s.1(1) of the Administration of Justice Act 1960, the present case is not. It is the submission of both counsel, with which we agree, that this is a civil cause or matter: see in particular the observations of Lord Hobhouse of Woodborough in *Government of the USA v Montgomery* [2001] 1 WLR 196, 207 E. In consequence any appeal from our decision would lie not to the House of Lords but to the Civil Division of the Court of Appeal.
10. Mrs Pretty took her case to the European Court of Human Rights in Strasbourg (“ECtHR”), but it concluded that there was no breach of her ECHR rights. Nevertheless the court made a number of observations about the application of art 8(1) of the ECHR which are relied on by the claimant in the present case, and to which we shall return.

11. The claimant alleges that the DPP has acted in a way which is incompatible with a Convention right namely that contained in art 8(1), and the DPP, as a public authority, cannot justify this interference within the terms of art 8(2). Art 8 is headed:

“Right to respect for private and family life.”

It provides:

“(1) Everyone has the right for respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety, or the economic wellbeing of the country, for the protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The claim raises the following questions.

- (i) whether the prohibition on aiding or abetting, counselling or procuring a suicide in s.2(1) of the Act engages art 8(1) of the ECHR; and
  - (ii) if so, whether the prohibition on assisted suicide meets the requirement of art 8(2) of the Convention that any interference with art 8(1) rights must be “in accordance with the law”. The claimant’s case is that can only be fulfilled if the DPP issues a public statement of policy as to the circumstances in which he will exercise his discretion to consent to prosecution under s.2(4) of the Act.
12. Mr Pannick Q.C., for the claimant, submits that the first question (concerning the art 8(1) rights), is in reality divided into two. First, whether the right to choose the manner of one’s death falls within the scope of the right; secondly, whether the ban on assisted suicide in s.2(1) of the Act constitutes an interference with that right.

*The Prosecution of Offences Act 1985 and the Code for Crown Prosecutors*

13. S.1 of the Prosecution of Offences Act 1985 (“the POA”) provides that there is to be a Crown Prosecution Service for England and Wales and that the DPP is to be the head of it. Crown prosecutors for designated areas of the country are to be responsible to him for directing the service in their areas.

S.1(6) provides:

“Without prejudice to any functions which may have been assigned to him in his capacity as a member of the service, every Crown Prosecutor shall have all the powers of the Director as to the institution and conduct of criminal proceedings but shall exercise those powers under the direction of the Director.”

And s.1(7):

“Where any enactment (whenever passed) –

- (a) prevents any step from being taken without the consent of the Director or without his consent and the consent of another; or
- (b) requires any step to be taken in relation to the Director,

any consent given by or, as the case may be, step taken by or in relation to, a Crown Prosecutor shall be treated, for the purposes of that enactment as given by or, as the case may be, taken by or in relation to the director.”

S.10(1), which is headed “Guidelines for Crown Prosecutors,” provides:

“10(1) the Director shall issue a code for Crown Prosecutors giving guidance on general principles to be applied by them –

- (a) in determining, in any case –
  - (i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or
  - (ii) what charges should be preferred; and
- (b) in considering, in any case, representations to be made by them to any magistrates court about the mode of trial suitable for that case.

(2) the Director may from time to time make alterations in the Code”.

14. The Code for Crown Prosecutors issued under s.10 sets out a two stage test for determining whether proceedings should be instituted. The first stage requires an assessment of whether there is sufficient evidence to provide a realistic prospect of a conviction. If, but only if, the first stage is satisfied it is then necessary to assess whether it is in the public interest to proceed with a prosecution.
15. The current edition of the Code makes the following general point at para 2.1:

“Each case is unique and must be considered on its own facts and merits. However, there are general principles that apply to the way in which Crown Prosecutors must approach every case.”
16. The Code, having referred to the statement of Lord Shawcross in 1951 that it has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution, provides at para 5.7:

“The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution.”

And para 5.8:

“Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.”

17. The Code then proceeds to list in para 5.9 17 common public interest factors in favour of prosecution and in para 5.10 9 common public interest factors against prosecution. Those that may be regarded as possibly pertinent to the issue in the present case are:

For prosecution:

- (a) A conviction is likely to result in a significant sentence;
- (e) The defendant was in a position of authority or trust;
- (f) The evidence shows the defendant was a ringleader or organiser of the offence;
- (g) There is evidence that the offence was premeditated;
- (h) There is evidence that the offence was carried out by a group;
- (i) The offence was committed in the presence of, or in close proximity to, a child;
- (k) The offence was motivated by any form of discrimination against the victim’s ethnic or national origin, disability, sex, religious beliefs, political views or sexual orientation, or the suspect demonstrated hostility towards the victim based on any of those characteristics;
- (l) There is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;

- (m) The defendant's previous convictions or cautions are relevant to the present offence;
- (n) The defendant is alleged to have committed the offence while under an order of the court;
- (o) There are grounds for believing the offence is likely to be continued or repeated, for example by a history of recurring conduct.

Against prosecution:

- (a) The court is likely to impose a nominal penalty;
  - (f) A prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence. (This could conceivably be relevant in the event of an attempt to commit the offence).
  - (g) The defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated.
18. It must, of course, be appreciated that the Code is of general application and applies when consideration is being given to prosecution for offences of different kinds, right across the board. Some, perhaps most, of the criteria will not be relevant when considering prosecution for offences under s.2(1). The claimant submits there is no reason why the DPP cannot promulgate an offence specific prosecution code for offences under s.2(1).
19. In *Pretty*, several of their Lordships commented on the question of whether the DPP could or should promulgate a specific prosecuting policy in relation to offences under s.2(1) of the Act. Lord Bingham of Cornhill said in *Pretty* at para 39:

“I would for my part question whether, as suggested on his behalf, the Director might not if so advised make a public statement on his prosecuting policy other than in the Code for Crown Prosecutors which he is obliged to issue by s.10 of the Prosecution of Offences Act 1995. Plainly such a step would call for careful consideration and extreme circumspection, and could be taken only under the superintendence of the Attorney General (by virtue of section 3 of the 1985 Act). The Lord Advocate has on occasion made such a statement in Scotland, and I am not persuaded that the Director has no such power. It is, however, unnecessary to explore or resolve that question, since whether or not the Director has the power to make such a statement he has no duty to do so, and in any event what was asked of the Director in this case was not a statement of prosecuting policy but a proleptic grant of immunity from

prosecution. That, I am quite satisfied, the Director had no power to give.”

20. Lord Hope of Craighead at para 81 said the Lord Advocate had not issued a statement as to his policy regarding the prosecution of assisted suicide, which in Scotland is a common law crime. He would have power to do so if he thought it was appropriate in the public interest. That, we are told, remains the position today. He said (para 80) he would not regard it as beyond the DPP’s powers to make a statement on the policy he would follow in cases of assisted suicide.
21. Lord Steyn likewise thought there was a power for the DPP to issue guidance as to how his discretion will be exercised in regard to particular offences. But he envisaged that the occasions on which such statements would be appropriate and in the public interest would be rare (para 66).
22. Lord Hobhouse stated categorically at para 114 that the functions of the DPP do not include giving undertakings in advance of the event as to how he would exercise his discretion, whether or not to prosecute, on hypothetical facts.
23. There are instances where the DPP has published a more detailed policy about how the Crown Prosecution Service deals with particular types of case. Domestic violence, bad driving and football related offences are three examples to which we were referred. It is not suggested that the DPP was under any duty to publish these documents, but he plainly had power to do so and thought it would be helpful in the particular circumstances. Each of those policy guidelines covers a very different situation from that in the present case. We shall return to them later.
24. Mr Pannick reminds us that the issue in *Pretty* was whether she was entitled to obtain from the DPP a proleptic grant of immunity from prosecution. Here the focus is on whether the DPP is obliged to publish criteria as to the circumstances in which consent will or will not be given for a prosecution under s.2(1) of the Act. The observations of, in particular, Lord Bingham, about the lack of such a duty are not therefore binding.
25. Two matters strongly influence the arguments in the present case. The first is that the definition of the offence created by s.2(1) of the Act is very widely expressed. The second is that there is now a very significant body of public opinion that feels that some circumstances should be excluded from its ambit. The claimant’s contention in the present case is that, despite the view of Lord Bingham and the other observations of their Lordships in *Pretty*, the offence created by s.2(1) of the Act does interfere with the art 8(1) rights of both the potential suicide and anyone who would assist her. The only way the DPP can justify that interference and make it “according to the law” is by exercising his power to issue a specific policy statement on the criteria he would consider when deciding whether to grant consent to the prosecution for an offence under s.2(1) of the Act, and this he is obliged to do.
26. No such duty is to be found in our domestic legislation and, as Lord Hope pointed out at para at 75 in *Pretty*, had it not been for the Human Rights Act 1998, *Mrs Pretty’s* case would have been unarguable. That is true in the present case too.

*The decisions of the House of Lords and Strasbourg on art 8(1) in Pretty*

27. The House of Lords in *Pretty* concluded that *Mrs Pretty's* rights under art 8 were not engaged at all. We accept that there are no facts that would make the present case distinguishable in that regard. The Secretary of State's argument in *Pretty* was that the right to private life under art 8(1) relates to the manner in which a person conducts his life, not the manner in which he departs from it. The alleged right to exercise self-determination to die would extinguish the very benefit on which it is supposedly based. It was submitted that art 8(1) protects the physical, moral and psychological integrity of the individual, including rights over the individual's own body, but there is nothing to suggest when or how they would die.

28. Lord Bingham considered the authorities and in particular *Rodriguez v Attorney General of Canada* [1994] 2LRC 136. He noted that there was no Strasbourg jurisprudence to support Mrs Pretty's contention. He concluded at para 26:

"I would for my part accept the Secretary of State's submission that Mrs Pretty's rights under article 8 are not engaged at all. If, however, that conclusion is wrong and the prohibition of assisted suicide in section 2 of the 1961 Act infringes her Convention rights under article 8, it is necessary to consider whether the infringement is shown by the Secretary of State to be justifiable under the terms of article 8(2)."

29. Lord Steyn said at 835H, para 61:

"Counsel submitted that (article 8) explicitly recognises the principle of the personal autonomy of every individual. He argues that this principle necessarily involves a guarantee as against the state of the right to choose when and how to die. None of the decisions cited in regard to article 8 assist this argument. It must fail that on the ground that the guarantee under article 8 prohibits interference with the way in which an individual leads his life and it does not relate to the manner in which he wishes to die."

30. Lord Hope at 964E, para 100, having noted that no authority had been cited in support of the proposition that art 8 was engaged, went on:

"The wording of the article does not help either. Respect for a person's "private life", which is the only part of article 8(1) that is in play here, relates to the way a person lives. The way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. In that respect Mrs Pretty has a right of self-determination. In that sense, her private life is engaged even where in the face of a terminal illness she seeks to choose death rather than life. But it is an entirely different thing to imply into these words a positive obligation to give effect to her wish to end her own life by means of an assisted suicide. I think that to do so would be to stretch the meaning of the words too far."

31. He added that a strained reading might have been appropriate if there was evidence of a consensus of international opinion in favour of assisted suicide, but there was none.
32. Lord Hobhouse at para 112 agreed with Lords Bingham, Steyn and Hope that Mrs Pretty's human rights were not infringed and wished to add nothing to what they had said. He observed that that conclusion was sufficient to necessitate the dismissal of the appeal. Lord Scott of Foscote expressed complete agreement with the opinions of Lords Bingham, Steyn and Hope.
33. Faced with this formidably body of authority, how is it that Mr Pannick is able to contend that art 8 is nevertheless engaged in the present case? The key to his argument is that Mrs Pretty took her case to the ECtHR and, although her appeal was dismissed and the court concluded that there had been no violation of art 8, he submits the ECtHR took a different view about the engagement of art 8(1). Furthermore, he emphasises, it was a unanimous judgment.
34. What the court had to say on the applicability of art 8(1) bears close examination. It said at para 61 and 62 that although no previous case had specifically established that any right of self determination was contained in art 8 of the Convention, the court considered that the notion of personal autonomy was an important principle underlying the interpretation of its guarantee. It went on to observe that the ability to conduct one's life in the manner of one's choosing may also include the opportunity to pursue activities perceived to be of a morally harmful or dangerous nature for the individual concerned and that state interference is viewed as trespassing on the private and personal sphere.
35. Para 62 of the judgment went on:

“However, even when the conduct poses a danger to health, *or arguably where it is of a life threatening nature* (our emphasis) the case law of the Convention institutions has regarded the state's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the scope of article 8(1) and requiring justification in the terms of the second paragraph.”

The court then said at para 65:

“The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.”

The critical passage in the judgment is at para 67 where the court says:

“The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under article 8(1) of the Convention. It considers below whether this interference conforms with the requirements of the second paragraph of article 8.”

36. The wording of this paragraph is slightly curious. The expression that the court “is not prepared to exclude that it constitutes interference” is a good deal less firm than holding categorically that it would be an interference. On the other hand, as Mr Pannick points out, the last sentence of the paragraph specifically refers to “this interference”. As this is a judgment to which all the members of the court subscribed, it may be that the expression covers beneath it differing opinions about the ambit of art 8(1) and, further, that regardless of any finally concluded view on art 8(1) the court felt it was necessary to go on and consider compliance with art 8(2).
37. The court then went on to consider whether an interference with the exercise of art 8 right in this case was compatible with the art 8(2). It noted, at para 69 of the judgment, that the only issue arising from the arguments of the parties was the necessity of any interference. The court stated (in para 69) that it was “common ground that the restriction on assisted suicide in this case was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others”. However, in the present case it is the essence of Mr Pannick’s second point that the restrictions on assisted suicide imposed by the creation of the offence under s.2(1) are not “in accordance with the law”, because the decision on whether to prosecute someone for the offence is determined by the exercise of an unfettered executive discretion, and the creation of an executive act.
38. The court concluded that the blanket nature of the ban on assisted suicide did not appear to be disproportionate. It said:

“76.....The Government has stated that flexibility is provided for in individual cases by the fact that consent is needed from the DPP to bring a prosecution and by the fact that a maximum sentence is provided, allowing lesser penalties to be imposed as appropriate. The Select Committee report indicated that between 1981 and 1992 in 22 cases in which “mercy killing” was an issue, there was only one conviction for murder, with a sentence for life imprisonment, while lesser offences were substituted in the others and most resulted in probation or suspended sentences. It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.”

39. Accordingly, the reference to the ECtHR failed because the requirements of art 8(2) were met. On the face of it there is some doubt whether the court definitively concluded that art 8(1) was engaged or whether the court decided to proceed on the assumption that it was, but determined the case by its conclusion that there was compliance with art 8(2).
40. Mr Pannick submits that we should be left in no such doubt about the court's conclusion on whether an art 8(1) right was infringed in *Pretty*. He points in the first place, to para 78, where the court concludes that “*the interference in this case*” may be justified under art 8(2). Secondly, he points to the express statement at para 87 (under the heading: “The court's assessment”) that the court “*has found above that the applicant's rights under art 8 of the Convention were engaged*”, and there is a footnote referring the reader to paras 61 -67.
41. We see force in this argument, although we still find it odd that the primary conclusion of the court on the art 8(1) issue should be expressed in such tentative terms in para 67 of the judgment. What, however, is apparent is that that the Strasbourg court took a very different and wider view about the ambit of art 8 than the House of Lords.

*Should the Divisional Court follow the House of Lords or the European Court?*

42. The general principle is to be found in the speech of Lord Bingham in *Kay v Lambeth LBC* [2006] 2 AC 465, [2006] UKHL 10 at para 43 where he said:

“As Lord Hailsham observed ([1972] AC 1027, 1054), “in legal matters, some degree of certainty is at least as valuable a part of justice as perfection”. That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possible to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.”

He went on to explain that there was a more fundamental reason for adhering to our domestic rule.

“The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national

authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.”

43. Lord Bingham then went on to make one particular exception. In *D v East Berkshire Community NHS Trust* [2004] QB 558 the court held that the decision of *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 could not survive the introduction of the Human Rights Act 1998. This was because the effect of the Human Rights Act 1998 had undermined the policy considerations that had largely dictated the House of Lords decision. When the East Berkshire case reached the House of Lord, it was accepted that *X v Bedfordshire* was no longer good law. But, as Lord Bingham went on to point out, there were other considerations which made *X v Bedfordshire* a very exceptional case. Judgment was given in 1995, well before the 1998 Act. No reference was made to the European Convention in any of the opinions. And, said Lord Bingham:

“.....importantly, the very children whose claim in negligence the House had rejected as unarguable succeeded at Strasbourg in establishing a breach of article 3 of the Convention and recovering what was, by Strasbourg standards, very substantial reparation: *Z v United Kingdom* (2001) 34 EHRR 97.”

44. On these extreme facts the Court of Appeal was entitled to hold that the decision in *X v Bedfordshire* could not survive the 1998 Act. But, he added, such a course is not permissible save where the facts are of that extreme character.
45. The unanimous decision in *Kay* of an enlarged committee of the House was that the lower courts should follow the decision of House of Lords. Mr Pannick argues that the facts of the present case are sufficiently extreme to fall within the exception as described by Lord Bingham. We cannot accept that submission. The exception is a very limited one that will apply only in the most exceptional circumstances. In our view Lord Bingham was leaving the door a chink ajar to cover unforeseeable but truly exceptional situations. The present case does not fall into that category. It is no more than a difference of opinion as to the ambit of art 8(1) between the House of Lords and the ECtHR. There do not seem to us to be any additional factors of the kind envisaged by Lord Bingham in *Kay*.
46. Furthermore, (and despite the statement in para 87 of the judgment) the somewhat elliptical wording of the European Court at para 67 of *Pretty* leaves us in considerable doubt about the extent to which the court might have disagreed with the House of Lords about the ambit of the rights created by art 8(1). Whilst we can see the force of Mr Pannick’s argument that the true ambit of art 8(1) is sufficiently wide to cover personal autonomy on the facts of this case, we must regard ourselves as bound by the decision by the House of Lords in *Pretty* which we should follow accordingly. It may be that the House of Lords will wish to follow the developing jurisprudence in Strasbourg on personal autonomy but that is a matter for them not us.

*Has the House of Lords subsequently departed from its view on the ambit of art 8(1)?*

47. Mr Pannick’s second argument under art 8(1) is that the House of Lords have departed from what they held in *Pretty*. Accordingly, what they said in *Pretty* is no longer the law. To follow this argument it is necessary to consider what the House of Lords have said in subsequent cases, in particular in *R (Countryside) Alliance v The Attorney General* [2008] 1 AC 16, [2007] UK HL 52. Mr Pannick’s argument is that by implication, at least, the House of Lords have accepted that the law is as enunciated by the ECtHR and art 8 is engaged in this case.
48. In *Countryside Alliance* the claimants sought a declaration that the Hunting Act 2004, which prevented the hunting of wild mammals with dogs, infringed and was incompatible with art 8 rights and other provisions in the ECHR. The House of Lords held that the purpose of art 8 was to protect individuals from unjustified intrusion by state agents into the private sphere within which they expected to be left alone to pursue their personal affairs and live as they chose. They also held that hunting with hounds was, by its nature, an activity conducted in public with social aspects involving the wider community and no analogy could be drawn with the Strasbourg jurisprudence relating to personal autonomy, cultural lifestyle, use of the home or loss of livelihood and thus art 8 was inapplicable. The facts were therefore far removed from those in *Pretty* and those in the present case.
49. One of the four headings under which the claimants presented their art 8 case was “private life and autonomy”. Lord Bingham said at 743G, para 11:

“From the court’s judgment in *Pretty* the claimants drew recognition (para 16) that “private life” is a broad term, not susceptible to exhaustive definition, but covering the physical and psychological integrity of a person, sometimes embracing aspects of an individual’s physical and social identity, protecting a right to personal development and the right to establish relations with others in the outside world, and extending to matters within (paras 61, 62) the personal and private sphere. The court held the notion of personal autonomy to be an important principle. The court was not prepared to exclude the possibility (para 67) that denial of a right to procure her own death was an interference with the applicant’s right to respect for private life.”
50. However, Lord Bingham was not persuaded that the claim could be brought within the ambit of this or any of the other four heads relied on. Lord Bingham did not refer to the difference in opinion between the House of Lords and the Court in Strasbourg about the engagement of art 8(1) in *Pretty*. What he did say, without demur, was that the ECtHR in *Pretty* held the notion of personal autonomy to be an important principle. For our part, we think that it does not necessarily follow that because personal autonomy is an important principle, art 8(1) is engaged in cases such as the present one and *Pretty*.
51. Lord Hope at 758 H para 54 expressly said that the court was not concerned with personal autonomy in the sense referred to in *Pretty* at paras 61 and 66 of the

ECtHR’s judgment, because *Countryside Alliance* was not a case about the choices that a person makes about his or her own body or physical identity.

52. Lord Brown of Eaton-Under-Heywood was anxious to see the scope of art 8 further developed by the Strasbourg court. He said at 78 G para 139:

“Why should it not encompass a broad philosophy of live and let live (or, in Mrs Pretty’s case, let die: *Pretty v United Kingdom* 35 EHRR I)? Why should people not be free to engage in whatever pursuits they wish – pursuits, that is, central to their well being, as hunting was recognised in the courts below to be in the lives of some of these appellants (“a core part”) – unless there is good and sufficient reason (as, indeed, was found in Mrs Pretty’s own case) to forbid it? Article 8’s protection is recognised to extend to a right to identity and to personal development and, as *Pretty* first articulated, the notion of personal autonomy. It encompasses almost any aspect of a person’s sexuality and a good deal else that is clearly personal. But why should respect for private life not encompass also wider concepts of self-fulfilment?”

Then at 781 C para 41:

“Naturally I have considered whether this House ought itself properly to construe and apply article 8(1) sufficiently widely to encompass some at least of these appellants. But I conclude not. It is one thing to say that member states have a margin of appreciation, perhaps a wide margin, when it comes to striking any balance that falls to be struck under article 8(2) (or, for that matter, in respect of any other qualified right); quite another to say that a comparable margin exists for determining whether the qualified right (here article 8(1) is engaged in the first place. The reach of article 8 must be for the Strasbourg court itself to develop.”

53. Lord Rodger of Earlsferry agreed in particular with the reasons given by Lord Brown and mentioned at 769 H para 94 that the ECtHR in *Pretty* had pointed out that “private life” in art 8(1) is a “broad term”. He also noted that that court had said that the notion of “personal autonomy” was an important principle underlying the interpretation of the various guarantees, including the right to “personal development”, in that aspect of art 8(1).
54. Although their lordships in *Countryside Alliance* gave general support for broadening the scope of art 8(1) to cover personal autonomy, there was no reference to the dichotomy between the House of Lords and the Strasbourg decisions in *Pretty* about the engagement of art 8(1) in that case. It was not argued in the *Country Alliance* case that the House had to follow their decision in *Pretty*. Thus we cannot accept Mr Pannick’s submission that the House of Lords has, as he put it, moved on and now accepts that art 8 would be engaged in cases such as the present.

55. Mr Pannick also relied on *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 38, [2004] UK HL 27 and *Ghaidan v Godin-Mendoza* [2004] AC 557, [2004] UK HL 30 in support of his argument on this point.

56. In *Razgar* at 383 F, para 9 Lord Bingham said:

“Elusive though the concept is, I think one must understand “private life” in article 8 as extending to those features which are integral to a person’s identity or ability to function socially as a person.”

57. However, we can find nothing in either of these cases to indicate the House of Lords opinion that the lower courts should no longer consider themselves bound by their decision that art 8(1) was not engaged by the facts of *Pretty*.

*Conclusion on the art 8(1) point*

58. We therefore conclude that art 8(1) is not engaged on the facts of the present case. That would, in itself, be sufficient to dispose of this application, but in view of the divergence of opinion between the House of Lords and the ECtHR, and in deference to the careful and detailed arguments of counsel we go on to consider art 8(2).

59. Before leaving art 8(1) we should point out that even if its ambit is broadened to cover the personal autonomy of the claimant, in this case the court is ultimately concerned not with the claimant, but with a third party, (her husband), and the circumstances in which that third party may or may not be prosecuted. We accept, of course, the claimant has a close interest in this question but it is he, not she, against whom any criminal sanction would lie.

*Art 8(2)*

60. The question is whether if there is an interference with the exercise of the claimant’s right under art 8(1), the interference is by a public authority “in accordance with the law” as required by art 8(2) of the ECHR.

61. As we have already noted, Mr Pannick accepts, as the ECtHR concluded in *Pretty*, that in creating the offences identified in s.2(1) of the Act the aims of the state - to safeguard life thereby protecting the lives of others - are legitimate. He also accepts that these aims are necessary for a democratic society. But, unlike counsel for Mrs Pretty before the ECtHR, he does not accept that the interference created by s.2(1) and s.2(4) of the Act is “in accordance with the law”.

62. The steps in his argument are as follows: (i) Art 8(2) requires that an interference by a public authority with the art 8(1) right must be in accordance with the law. (ii) In the case of the offence defined in s 2(1) of the Act, an accused can only be prosecuted with the consent of the DPP (see s.2(4) of the Act), or Crown Prosecutors who can exercise his powers— see s.1(6) of the POA. (iii) An interference with an art 8(1) right will only be “in accordance with law” within art 8(2) if the domestic legislation that prescribes the offence is sufficiently precise. (iv) The discretion to prosecute given by the terms of s. 2(4) of the Act is not defined. Nor does s.2(4) give any guidance concerning the criteria to be used by the DPP or Crown Prosecutors when deciding

whether a person should be prosecuted for an alleged offence under s.2(1). (v) This lack of definition is not adequately remedied by the Code for Crown Prosecutors promulgated by the DPP pursuant to s.10 of the POA. (vi) Therefore the discretion given to the executive by virtue of s.2(4) is neither sufficiently clear as to its scope nor the manner of its exercise. (vii) Thus, the interference with the art 8(1) rights created by the offence defined in sections 2(1) and 2(4) of the Act is neither sufficiently accessible nor foreseeable and so is not “in accordance with the law” within art 8(2) as interpreted by the jurisprudence of the ECtHR. (viii) This failure can only be remedied by the promulgation of a specific Code by the DPP setting out with precision the criteria that would be applied by him and Crown Prosecutors when deciding whether or not to give consent to the prosecution of a person accused of committing an offence under s 2(1) of the Act.

63. Ms Rose’s argument to the contrary involves the following steps: (i) the terms of the offence set out in s.2(1) of the Act are clear and precise. Individuals know how to regulate their conduct and know that if they do things (within the jurisdiction) which fall within the scope of s.2(1) they are at risk of prosecution for that offence. The ECtHR has held, in *Pretty*, that the creation of the offence is, in itself, not a disproportionate infringement of the art 8(1) rights. (ii) There are two principal reasons for needing the discretionary power created by s.2(4) of the Act. First, it is to prevent private prosecutions. Secondly, it is to ensure that there is proper regulation and control over prosecutions for this particularly sensitive offence. (iii) Section 2(4) does not infringe the requirement that the interference with the art 8(1) rights must be “in accordance with the law” for two reasons. First, because any decision concerning consent to prosecute must be reasonable according to common law principles of administrative law. Secondly, because any decision must be in accordance with the Code promulgated under section 10 of the POA. (iv) The existence of those restraints on discretion are known and accessible and their application foreseeable. They are sufficiently clear and precise. (v) Accordingly, the infringement of the art 8(1) rights are “in accordance with the law”. (vi) There is therefore no requirement that the DPP promulgate a specific Code setting out the criteria to be applied when he or Crown Prosecutors are deciding whether or not to prosecute a person alleged to have committed an offence under s.2(1) of the Act.

#### *Discussion*

64. The nature of the offence created by s.2(1) is such that the variety of facts which may give rise to the commission of that offence, and therefore which may result in a person being prosecuted, is almost infinite. The basic reason for the provision in s.2(4) that a prosecution for an offence under s.2(1) of the Act can only be brought with the consent of the DPP (or a Crown Prosecutor exercising his powers) is that without such consent there is a risk of prosecutions (particularly private prosecutions) being brought in inappropriate circumstances. There are some, perhaps, many, cases where, the basic facts would appear to demonstrate that the offence of aiding or abetting, counselling or procuring a suicide had been committed, where deeper investigation might suggest otherwise or at least that there should not be criminal proceedings.
65. In 1997 the Law Commission issued a report called “Consents to Prosecution”. In para 3.33, it refers to a Home Office Memorandum to a Departmental Committee that was considering section 2 of the old Official Secrets Act 1911 (Cmnd 5104 (1972)),

which identified five overlapping reasons for considering the inclusion of a consent requirement in a statute which created or codified a criminal offence. Four reasons are of particular concern in relation to the offence set out in s.2(1) of the Act. First, to secure consistency of practice in bringing prosecutions. Secondly, to prevent abuse, eg by vexatious private prosecutions. Thirdly, to enable account to be taken of mitigating factors. Lastly, to provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, as this area of the law undoubtedly is.

66. Thus there can be no complaint of the existence of the “consent” provision itself; indeed, Mr Pannick does not criticise it. The thrust of his argument is that it confers on the executive too wide and imprecise a discretion as to when a person may be prosecuted under s.2(1) of the Act. So wide and ill – defined is this discretion as to make a decision to prosecute a person accused of committing an offence under s.2(1) an unacceptable infringement of his rights under art 8(1) of the ECHR because such an exercise of discretion could not be “in accordance with the law”.
67. In this regard he points to the statement of the ECtHR in *Herczegfalvy v Austria* (1992) 15 EHRR 437, that “if a law confers discretion on a public authority, it must indicate the scope of that discretion, although the degree of precision required will depend upon the particular subject matter”: see para 89. He notes that the same case makes it clear that the requirement under art 8(2) of the ECHR is that a domestic law must indicate the scope of the relevant discretion so as to “offer a minimum degree of protection against arbitrariness required by the rule of law in a democratic society”: see para 91.
68. Mr Pannick also relied particularly on the statement of the ECtHR in *Hasan and Chaush v Bulgaria* (2002) EHRR 55 (p.1339), that:

*“The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed”.*
69. Mr Pannick submitted that neither the general requirements of administrative law that an executive decision to prosecute, taken under s.2(4) of the Act, nor the fact that the DPP has promulgated a General Code for Crown Prosecutors for determining whether criminal proceedings should be instituted or continued, provides the minimum degree of protection from arbitrariness necessary. He points out that the DPP has promulgated specific codes setting out the criteria to be applied when deciding whether or not to prosecute alleged offences of domestic violence, rape and driving offences. He asks, rhetorically, why cannot the same exercise be done in the case of s.2(1) and 2(4) of the Act?
70. Ultimately, both counsel accepted that the basic question on this part of the case is whether the General Code that has been promulgated by the DPP under s.10 of the POA is sufficiently clear and precise to provide the minimum degree of protection against arbitrariness so as to fulfil the requirements of art 8(2) as elaborated by the ECtHR in such cases as *Herczegfalvy and Hasan and Chaush*. If it does, then Mr Pannick accepts, following the House of Lords’ remarks in *Pretty* (paras 39 and 66 in

particular) that the DPP cannot be forced to promulgate any more particular Code setting out specific criteria to be considered when deciding whether to prosecute a person said to have committed the offence set out in s.2(1) of the Act.

71. It should be recalled that the ECtHR has recognised that it may be difficult to frame laws with precision in a particular area with which that law is concerned and also that a degree of flexibility may be desirable. See: *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 at para 49; and *Goodwin v United Kingdom* (1996) 22 EHRR 123 at para 33. If, as the ECtHR held in *Pretty* and as Mr Pannick accepts, it is legitimate for the state to create an offence of aiding and abetting, counselling or procuring suicide, then, we think, two things inevitably flow from that legitimate policy decision. The first is that it is going to be difficult to frame a law which covers the almost infinite variety of circumstances in which the offences might occur. Thus a more closely worded form of definition of the offence is not possible. But Parliament has nevertheless clearly stated that it is an offence to aid, abet, counsel or procure suicide. Any person who contemplates doing so can foresee that they would be breaking the criminal law. Mr Pannick therefore rightly did not criticise the scope of the wording of s.2(1) of the Act.
72. The second consequence is that, as a matter of legitimate public policy, it is desirable to have a degree of flexibility in the law in this area. Given the need for certainty in the definition of what constitutes the *actus reus* and the *mens rea* of the offences created by s.2(1) of the Act, the only way to have such flexibility is by creating the statutory requirement of permission before a potential accused can be prosecuted. In the criminal law of England and Wales, decisions on whether or not to prosecute offences are not taken by judges. They are taken by the executive. In our view, s.2(4) of the Act was clearly intended to grant this flexibility and followed established constitutional practice (which is not challenged) in putting the means of exercising the flexibility – by a discretion as to prosecution – in the hands of the executive in the form of the DPP and his delegates.
73. Section 2(4) does not provide a statutory defence, nor does it create a category of individuals who will not be prosecuted for the offence, even though they have committed the necessary *actus reus* and have the necessary *mens rea* of the offence as defined in s.2(1). As Phillips LJ put it in *Dunbar v Plant* [1998] Ch 412 at 437 F, s.2(4) simply recognises that there may be “circumstances in which the offence was committed [which] may be such that the public interest does not require the imposition of any penal sanction”.
74. If, as we conclude, the principle of flexibility created by s.2(4) is itself legitimate, the next question arises. This is whether this flexibility, in the form of executive discretion, is so unclear or unfettered that it fails to meet the required Convention standards of “clarity and foreseeability” as to the manner of its exercise: see: *Hassan and Chaush v Bulgaria* at para 86. If it so does fail, then the law (ie. s 2(4)) will not afford adequate protection against arbitrary interference with the art 8(1) right, so that it will not be “in accordance with the law” and the interference with the art 8(1) right cannot be justified: see *Goodwin v UK* at para 33.
75. We have concluded that the combination of the Code of Practice that has been promulgated by the DPP under s.10 of the POA and the administrative law principles and remedies as have been developed in the common law of England and Wales

satisfy the required Convention standards of clarity and foreseeability. Thus if the guidance in the Code of Practice is followed reasonably and rationally by the DPP and his delegates and only relevant factors are taken into account in making a decision on whether to prosecute an offence under s.2(1) of the Act, it cannot be said that the exercise of the discretion on whether to prosecute constitutes an arbitrary or unfettered power of the executive. Any failure by the DPP and his delegates to act in this way can be dealt with either by the legal remedy of judicial review of the decision of the DPP or his delegate or within the context of the criminal proceedings themselves: see *Pretty* at para 67 per Lord Steyn.

76. In *Hasan and Chaush v Bulgaria*, the ECtHR said, at para 84:

“In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.

The level of precision required by domestic legislation – which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed”.

77. Taking these statements as guidance, we think that the following conclusions can be drawn as to the scope of the discretion conferred on the DPP and his delegates by s.2(4) of the Act and the manner of its exercise. First, the scope of the discretion concerns only the one offence, which is clearly identified and defined in s.2(1) of the Act, albeit in broad terms.

78. Secondly, although the possible factual basis for the offences covered by s.2(1) are almost infinitely varied, it seems likely that the number of possible offences under s.2(1) that are committed each year is not large. We base this conclusion on two facts. Mr CWP Newell, the Principal Legal Adviser to the CPS stated in his letter of 14 January 2008 to Bindman & Partners (acting for Ms Purdy) that there are no centralised records concerning numbers of alleged offences and possible prosecutions under s.2(1) of the Act. Secondly, in the witness statement of Mr Daniel Llewelyn Jones, a Crown Prosecutor and a Team Leader in the Policy Directorate of the Crown Prosecution Service, he states that he sought information from all CPS Area offices in England and Wales and the HQ Central Casework Divisions for details of all cases in the last 10 years sent to the CPS concerning those who had travelled abroad in order to commit suicide. Only 8 were identified.

79. Thirdly, the discretion exercised under s.2(4) of the Act must be exercised rationally and reasonably and within the guidelines set out by the statutory Code promulgated under s.10 of the POA. In our view the Code is clear and sufficiently precise. It stipulates that there is a two stage process to making a decision on whether to prosecute. The first is consideration of the evidence. If the evidence does not satisfy the “realistic prospect of conviction” test, then there will be no prosecution. But, even if it does, the prosecutor must then consider the second matter: the public interest. We have already set out the factors that must be taken into account at that stage. The

factors in favour of prosecution set out at para 5.9 (e), (g), and (i) might be important in this type of case. The factors against prosecution set out at paras 5.10 (a) and (g) may be particularly important in relation to s.2(1) offences. Para 5.12, which emphasises that Crown Prosecutors should always take into account the views expressed by the “victim’s” family, is especially important in this type of case. This gives scope for the fact that among the circumstances in which an offence under s.2(1) might arise there are frequently sensitive and peculiar factors to be considered in weighing the public interest. The evidence of Mr Daniel Llewelyn Jones, is that the Code is strictly applied in respect of possible prosecutions under s.2(1) of the Act.

80. In our view, there are special reasons why the DPP has promulgated specific Codes of Practice in relation to crimes of domestic violence, bad driving and football related offences. First, in each case those types of offence constitute a particularly prevalent social problem. Secondly, however, the circumstances in which those types of offence might arise they are, in our view, likely to be more easily identifiable than in the case of possible s.2(1) offences. Thirdly, in the case of domestic violence in particular, there had been a perception for many years that the authorities would not prosecute “domestics”. Fourthly, in all cases, because those types of offence are widespread and constitute a prevalent social problem, it was clearly imperative that the public should understand the specific criteria that the DPP and Crown Prosecutors would employ in deciding whether to prosecute them.
81. The line between the need to make the scope of the discretion under s.2(4) and the manner of its exercise sufficiently clear, and the rule that no executive authority can give undertakings in advance of the event as to how he would exercise that discretion may be a difficult one. Whilst a specific Code in relation to offences under s.2(1) of the Act may assist the first, it would be in danger of infringing the second if it descended into specific types of situation. As Lord Bingham stated in *Pretty*, at para 39, no specific Code could be promulgated without careful consultation and extreme circumspection.

*Conclusion on art 8(2)*

82. Therefore, as we have stated, in our view the present Code, promulgated under s.10 of the 1985 Act, together with the general safeguards of the administrative law, are sufficient to satisfy the requirement that the discretion be “in accordance with the law” of art 8(2) of the ECHR as interpreted by the Strasbourg jurisprudence.

*Overall conclusion*

83. The art 8 rights of Ms Purdy are not infringed. If however, the creation of the offence defined in s.2(1) of the Act is an interference with the art 8(1) rights of Ms Purdy, the scope of the discretion as to prosecution for the offence and the manner of its exercise under s.2(4) of the Act is “in accordance with the law”. Any infringement of her art 8(1) right is justified under art 8(2). Accordingly Ms Purdy cannot establish any breach of her Convention right under art 8 and her claim fails.
84. We cannot leave this case without expressing great sympathy for Ms Purdy, her husband and others in a similar position who wish to know in advance whether they will face prosecution for doing what many would regard as something that the law should permit, namely to help a loved one to go abroad to end their suffering when

they are unable to do it on their own. This would involve a change in the law. The offence of assisted suicide is very widely drawn to cover all manner of different circumstances; only Parliament can change it.